IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 14-15422-E

SATURN TELECOMMUNICATION SERVICES, INC.,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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AMENDED CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 28-1(b), the Federal Communications Commission hereby submits the following amended certificate of interested persons (adding David L. Lawson, in-house counsel for AT&T, and Loretta Lynch, Attorney General, U.S. Department of Justice, to the list of persons and entities previously identified on April 2, 2015):

1. Alan C. Gold, P.A.: Law firm representing Petitioner Saturn Telecommunication Services, Inc.
2. Amarant, Mark G.: Former Chief Executive Officer of Petitioner Saturn Telecommunication Services, Inc.
3. AT&T Services, Inc.: A wholly owned subsidiary of AT&T Inc. and affiliate of defendant (in the FCC proceedings) BellSouth Telecommunications, LLC, d/b/a AT&T Florida.
4. AT&T Inc. (NYSE: T): Parent corporation of AT&T Services, Inc. and BellSouth Corporation.
5. Baer, William J: Assistant Attorney General, Antitrust Division – Appellate Section, legal representative of Respondent United States of America.
6. BellSouth Corporation: A wholly owned subsidiary of AT&T Inc.

7. BellSouth Telecommunications, LLC, d/b/a AT&T Florida: A wholly owned subsidiary of BellSouth Corporation and the defendant in the FCC proceedings.

8. Bourne, Laurence N.: Office of General Counsel, FCC.

9. Citrin, Sarah E.: Office of General Counsel, FCC

10. Cloud, Whitney C.: Attorney with Kellogg, Huber, Todd, Evans & Figel, P.L.L.C., representing AT&T.

11. DeltaCom, LLC: An Alabama limited-liability company and the survivor of a merger with Saturn Telecommunication Services, Inc.

12. Department of Justice, United States of America: Legal representative of Respondent United States of America.

13. Dortch, Marlene H.: Secretary, FCC.

14. EarthLink Business, LLC: A Delaware limited-liability company and parent company of DeltaCom, LLC.

15. EarthLink Business Holdings, LLC: A Delaware limited-liability company and parent company of EarthLink Business, LLC.

16. EarthLink Holdings Corp. (NASDAQ: ELNK): A publicly held Delaware corporation and parent company of EarthLink Business Holdings, LLC.

17. Ellison, Michele: former Chief, Enforcement Bureau, FCC, and current FCC Deputy General Counsel.

18. Federal Communications Commission: Respondent.

19. Fink, Lori A.: In-house counsel for AT&T.

20. Foley, Paula: In-house counsel for EarthLink.

21. Gold, Alan C.: Attorney representing Petitioner Saturn Telecommunication Services, Inc. and principal of Alan C. Gold, P.A.

22. Gossett, David M.: FCC Deputy General Counsel.

23. Gray-Fields, Sandra: Enforcement Analyst, FCC.

24. Heimann, Christopher M.: In-house counsel for AT&T.

25. Holder, Eric H.: former Attorney General, Department of Justice, United States of America.

26. Hoskins, Terri L.: In-house counsel for AT&T.

27. Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.: Law firm representing AT&T.

28. Killion, Christopher L.: former Associate Chief, Enforcement Bureau, FCC, and current Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC.

29. Klineberg, Geoffrey M.: Attorney with Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., representing AT&T.

30. Kramer, Keith G.: Former Executive Vice President, Legal and Regulatory, for Saturn Telecommunication Services, Inc.

31. Lawson, David L.: In-house counsel for AT&T.

32. LeBlanc, Travis: Chief, Enforcement Bureau, FCC.

33. Lynch, Loretta E. (or her successor): Attorney General, Department of Justice, United States of America.

34. Marsicano, Lauren A.: Attorney representing Saturn Telecommunication Services, Inc. and associate of Alan C. Gold, P.A.

35. McEnery, Rosemary: former Acting Chief and current Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC.

36. Nicholson, Robert B.: United States Department of Justice, Antitrust Division – Appellate Section, legal representative of Respondent United States of America.

37. Parado, James L.: Attorney representing Petitioner Saturn Telecommunication Services, Inc. and associate of Alan C. Gold, P.A.

38. Phillips, Gary L.: In-house counsel for AT&T.

39. Saks, Lisa: Counsel, Enforcement Bureau, FCC.

40. Sallet, Jonathan B.: General Counsel, FCC.

41. Saturn Telecommunication Services, Inc.: Petitioner and plaintiff in the FCC proceedings.

42. Sommerfeld, Lawrence R.: Assistant United States Attorney, Northern District of Georgia/Eleventh Circuit, and legal representative of Respondent United States of America.

43. STS Telecom, LLC: A dissolved limited-liability company that merged with DeltaCom, LLC.

44. United States of America: Respondent.

45. Welch, Richard K.: Deputy Associate General Counsel, FCC.

46. Westrich, Scott A.: United States Department of Justice, Antitrust Division – Appellate Section, legal representative of Respondent United States of America.

47. Yates, Sally Q. (or her successor): United States Attorney, Northern District of Georgia/Eleventh Circuit, and legal representative of Respondent United States of America.

STATEMENT REGARDING ORAL ARGUMENT

Respondents support petitioner's request for oral argument.

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JURISDICTION

The petition for review challenges the Federal Communication Commission's (FCC's or Commission's) dismissal of a formal complaint by Saturn Telecommunication Services, Inc. (Saturn) against BellSouth Telecommunications, Inc. (BellSouth), doing business as AT&T Florida (AT&T).[1] *See generally Saturn Telecomm. Servs., Inc. v. BellSouth Telecomms., Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 4335 (A. Vol. IV, Tab L) (Enforcement Bur. 2013) (*Order*), *recon. denied*, Order on Reconsideration, 29 FCC Rcd 12520 (A. Vol. V, Tab N) (2014) (*Reconsideration Order*). The petition was filed on December 4, 2014—within 60 days of the release of the *Reconsideration Order* on October 7, 2014—and so is timely. *See* 28 U.S.C. § 2344. The *Reconsideration Order* is final, and this Court thus has jurisdiction. *See* 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a).

Although the Court has jurisdiction over the petition for review as a whole, Saturn failed to exhaust its administrative remedies as to one

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[1] AT&T's parent company, AT&T Inc., merged with BellSouth's parent, BellSouth Corp., in December 2006. *See generally AT&T Inc. and BellSouth Corp.*, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007). For convenience, this brief refers throughout to "AT&T," except when necessary to distinguish the pre-merger parent companies.

argument: that the release in a 2006 settlement agreement between Saturn and AT&T (Settlement Agreement) is automatically void based on AT&T's alleged material breach of contract. The Court thus lacks jurisdiction to consider that argument. *See* 47 U.S.C. § 405(a); *infra* pp. 48–49.

STATEMENT OF THE ISSUES PRESENTED

In the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress sought to open local telephone markets to competition. When implementing the 1996 Act, the FCC initially required an "incumbent" local telephone company to allow new market entrants to lease piece parts of the incumbent's network at cost-based prices to form end-to-end circuits. But in 2005, after the D.C. Circuit concluded that the FCC had not sufficiently justified that policy, the agency eliminated the requirement of cost-based access to the circuit components that direct calls to their destinations. As a result, Saturn, which had until then been leasing end-to-end circuits, began negotiating with AT&T to configure a new network that would combine local telephone wires, or "loops," leased at cost-based prices with other network components leased at more expensive, market rates.

The parties' negotiations foundered. In June 2006, Saturn complained about AT&T to both the Florida Public Service Commission (Florida Commission) and the FCC, alleging that AT&T's restrictions on what loops

Saturn could use in the reconfigured network were arbitrary; that AT&T had unlawfully refused to implement an automated process to move, or "migrate," Saturn's embedded customer base to the new network; and that AT&T was not negotiating in good faith. To resolve the Florida Commission and FCC proceedings (*2006 Proceedings*), the parties in November 2006 reached two agreements now central to this case: an "interconnection agreement" (Interconnection Agreement) and the Settlement Agreement. In the Interconnection Agreement, the parties defined AT&T's future obligations concerning both customer migration and what forms of loops to make available for Saturn's reconfigured network. The parties also designated the Florida Commission as the exclusive forum to resolve any disputes concerning the agreement. In the Settlement Agreement, AT&T pledged to make reasonable efforts to migrate 2,500 of Saturn's existing customers to the new network using an automated process, and also to give Saturn certain billing credits. In exchange, Saturn agreed never to "re-file . . . the allegations raised in or associated with" the *2006 Proceedings* in any forum. Settlement Agreement "Obligations" ¶¶ 5–6 (A. Vol. I, Tab B, 3) (Nov. 8, 2006). Saturn further released AT&T from all "[c]laims . . . asserted or which could have been asserted" in the settled proceedings "related to" Saturn's pleadings there. *Id.*

Notwithstanding the release in the Settlement Agreement and the forum-selection clause in the Interconnection Agreement, Saturn now asks this Court to require the FCC—in a formal complaint proceeding pursuant to Section 208 of the Communications Act of 1934 (Communications Act or Act), as amended, 47 U.S.C. § 208—to adjudicate claims and allegations that are identical or closely related to the claims and allegations Saturn raised in 2006. The petition for review presents the following questions:

(1) Whether the 2006 release bars Saturn's claims.

(2) Whether—despite Saturn's uncontested ability to bring claims for breach of the Settlement Agreement in federal district court, or for breach of the Interconnection Agreement before the Florida Commission—the release insulates AT&T for future violations of law in a manner contrary to public policy.

(3) Whether the Court has jurisdiction to consider Saturn's claim that the release is automatically void because AT&T materially breached the Settlement Agreement and, if so, whether the release is void on that basis.

(4) Whether the FCC reasonably determined that the Interconnection Agreement precludes Saturn from claiming that AT&T's network-design and migration policies violate Sections 251 and 271 of the Communications Act, 47 U.S.C. §§ 251, 271.

(5) Whether the FCC should have set aside the Interconnection Agreement's forum-selection clause.

(6) Whether the FCC reasonably held that Saturn has failed to state a claim under Sections 201 or 202(a) of the Act, 47 U.S.C. §§ 201, 202(a).

COUNTERSTATEMENT

A. Regulatory Background

1. Era of Dual State and Federal Regulation of Telephone Service

A local telephone network consists primarily of three parts: the loops that run from a telephone company's "switches" to each business or residential customer's telephone; those switches, which direct calls to their destinations; and "transport trunks," wires that carry calls between switches. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); *accord BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 966 (11th Cir. 2005).

Until the 1990s, regulators treated local telephone service as if it were a natural monopoly. *See AT&T*, 525 U.S. at 371. "States typically granted an exclusive franchise in each local service area to" the company—known as a "local exchange carrier"—that owned and operated the local telephone network. *Id.* In that historical environment, the Communications Act established "a system of dual state and federal regulation over telephone

service." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986). States regulated the rates and terms of intrastate communication services, while the FCC regulated the rates and terms of interstate and foreign communication services. *Id.*

The FCC's traditional authority over interstate and foreign communications includes, among other things, the power to require common carriers to provide such services on "just and reasonable" rates and terms. 47 U.S.C. § 201(b). The agency's responsibilities also include preventing "unreasonable discrimination" in connection with interstate and foreign communications, *id.* § 202(a), and requiring common carriers, when "desirable in the public interest, to establish physical connections with other carriers," *id.* § 201(a).

2. Telecommunications Act of 1996

a. Local Market Competition

In the 1996 Act, Congress amended the Communications Act to fundamentally alter the pre-existing regulatory framework. *See AT&T*, 525 U.S. at 371; *MCI WorldCom Commc'ns, Inc. v. BellSouth Telecomms., Inc.*, 446 F.3d 1164, 1167 (11th Cir. 2006). First, rejecting the assumption that local telephone service is a natural monopoly, the 1996 Act sought to open local telephone markets to competition by imposing upon incumbent local

exchange carriers "a host of duties intended to facilitate market entry" by "competitive" carriers. *AT&T*, 525 U.S. at 371. Second, to the extent the new market-opening provisions addressed such matters, the 1996 Act also extended federal rulemaking authority into intrastate matters that previously had been the exclusive domain of the states, *see id.* at 378 n.6, 381 n.8, while leaving to the states the significant role of implementing the new federal standards in arbitration proceedings, *see* 47 U.S.C. § 252; *AT&T*, 525 U.S. at 373.

"Foremost among" the new, market-opening duties addressed in the 1996 Act is "the [incumbent local exchange carrier's] obligation under 47 U.S.C. § 251(c) . . . to share its network with competitors." *AT&T*, 525 U.S. at 371. Section 251(c) of the Communications Act now permits competitive carriers, upon request, to "access . . . an incumbent's network" by "leas[ing] elements of the . . . network [such as loops] 'on an unbundled basis,'" *id.* (quoting 47 U.S.C. § 251(c)(3)); *accord MCI*, 446 F.3d at 1167, and by "interconnect[ing] [their] own facilities with the incumbent's network," *AT&T*, 525 U.S. at 371 (citing 47 U.S.C. § 251(c)(2)).

Under the 1996 Act, incumbent carriers must provide such network access "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(2)(D), (c)(3); *see id.* § 252(d)(1). The

FCC has adopted a cost methodology known as "TELRIC" (short for "total element long-run incremental cost") to implement the statutory cost-based ratemaking standard for interconnection and access to unbundled network elements. *See Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 495 (2002); *MCI*, 446 F.3d at 1167.

The requirement in Section 251(c)(3) of the Act that incumbent carriers make unbundled network elements available to competitors is not self-executing. *See, e.g.*, *MCI*, 446 F.3d at 1172 (noting that "the substantive obligations contained in the local competition provisions of section[] 251" are generally not "self-executing," but "rely for their content on the [FCC's] rules"); *see also CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 50 (4th Cir. 2011) ("[S]ection 251(c)'s obligations are not generally self-executing." (quoting Peter W. Huber et al., *Federal Telecommunications Law* § 5.6.2 (2d ed. Supp. 2011))). Rather, Congress directed the FCC to determine which network elements incumbents must make available on an unbundled basis to competitors. *See* 47 U.S.C. § 251(d)(2).

The FCC initially adopted a broad list of unbundled network elements that incumbent carriers were required to make available to their competitors, including the so-called "unbundled network element platform" (UNE-P), which consisted of "the combined local loop, switch and transport" elements.

Reconsideration Order ¶ 5 (A. Vol. V, Tab N, 2); *see Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand, 18 FCC Rcd 16978, 17342–44 ¶¶ 579–581 (2003) (*TRO*), *vacated in part and remanded, U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*). Access to the UNE-P at low, TELRIC-based rates made it easy for competitive carriers to serve their residential and small-business customers without supplying any network facilities of their own. *See Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 532 (D.C. Cir. 2006). The D.C. Circuit, however, determined that the FCC had not sufficiently justified a nationwide unbundling requirement for switches—a necessary component of the UNE-P—and remanded the issue for reexamination. *See USTA II*, 359 F.3d at 568–71; *see also BellSouth*, 425 F.3d at 966–67 (discussing *USTA II*).

On remand, the FCC eliminated the requirement that incumbent carriers provide access to switching as an unbundled network element. *See Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2641 ¶ 199 (2005) (*TRRO*), *aff'd, Covad*, 450 F.3d 528; *accord BellSouth*, 425 F.3d at 967. Under the FCC's order, competitive carriers had a "twelve-month transition period"—ending in early

2006—to "convert their UNE-P customers to alternative arrangements." *TRRO*, 20 FCC Rcd at 2641 ¶ 199. One possible alternative was for a competitive carrier to connect portions of the UNE-P (such as local loops) that remained available at TELRIC rates to more expensive, dedicated lines—known as "tariffed special access services"—used to complete point-to-point calls. *See Covad*, 450 F.3d at 532. Under a portion of the *TRO* that the *USTA II* decision did not disturb, incumbent carriers were already required to "permit requesting carriers" to secure such "commingl[ing]" of unbundled network elements with tariffed special access services, as well as "to perform the necessary functions to effectuate such commingling upon request." *TRO*, 18 FCC Rcd at 17343 ¶ 579. Such commingled arrangements were more expensive than the UNE-P had been (because of above-TELRIC rates for tariffed special access services), but commingling nevertheless enabled competitive carriers to retain some of the benefits of inexpensive network element unbundling.

The requirements of interconnection and access to unbundled network elements under Section 251(c) of the Communications Act are implemented through contracts, known as "interconnection agreements," between incumbent local exchange carriers and new entrants. *E.g.*, *CGM*, 664 F.3d at 50. Carriers may negotiate voluntary interconnection agreements that are

valid and controlling "without regard to the standards set forth in [Section 251(c)]." 47 U.S.C. § 252(a)(1). "State utility commissions" must "accept any such agreement unless it discriminates against a carrier not a party to the contract, or is otherwise shown to be contrary to the public interest." *Verizon*, 535 U.S. at 492. A negotiated agreement approved by a state commission governs the rights and obligations of the parties; a competitive carrier has no direct, statutory rights under Section 251(c)(2) or (3) independent of the contract. *See Core Commc'ns, Inc. v. SBC Commc'ns Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 7568, 7581–82 ¶ 32 (2003), *vacated on other grounds by SBC Commc'ns Inc. v. FCC*, 407 F.3d 1223 (D.C. Cir. 2005). Only if voluntary negotiations fail—and a state commission steps in to arbitrate—are the terms of access governed by the standards of Section 251(c) and the FCC's implementing regulations. *See Verizon*, 535 U.S. at 492–93.

b. Competition in the Long-Distance Market

In addition to opening local telephone markets to competition, the 1996 Act provided a previously unavailable avenue for a subset of local exchange carriers, known as "Bell Operating Companies,"[2] to begin providing long-

[2] The Bell Operating Companies are former subsidiaries of the integrated AT&T (Bell System) that became independent under the consent decree

distance (as well as local) service. *See AT&T Corp. v. FCC*, 220 F.3d 607, 611–12 (D.C. Cir. 2000). As amended, the Communications Act now requires Bell Operating Companies that "wish[] to provide in-region long[-]distance service" to "apply to the FCC for approval." *Id.* at 612 (citing 47 U.S.C. § 271(b)(1)); *accord MCI*, 446 F.3d at 1167. To obtain that approval, a Bell Operating Company must, among other things, demonstrate to the FCC that it "meets the fourteen requirements of a 'competitive checklist' contained in section 271(c)(2)(B)" of the Act, which in many respects overlap the requirements for all incumbent local exchange carriers in Section 251. *AT&T*, 220 F.3d at 612; *accord MCI*, 446 F.3d at 1167. As pertinent here, that checklist requires the Bell Operating Company to provide "[i]nterconnection in accordance with . . . section[] 251(c)(2)" and "[n]ondiscriminatory access to network elements in accordance with . . . section[] 251(c)(3)." 47 U.S.C. § 271(c)(2)(B)(i) & (ii).

All of the Bell Operating Companies, including AT&T, have now obtained FCC approval to provide long-distance service. *See TRRO*, 20 FCC Rcd at 2555 ¶ 36 n.110. Should they "cease[] to meet any of the [checklist] conditions," the FCC may take enforcement action. 47 U.S.C. § 271(d)(6)(A).

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resolving the Bell System antitrust litigation. *See Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 141 (D.C. Cir. 2010).

B. Saturn's Dispute with AT&T in 2006

Before the FCC issued its February 2005 order on remand from the D.C. Circuit's *USTA II* decision, "[Saturn] and AT&T were parties to an interconnection agreement under which [Saturn] served its residential and small business customers by leasing UNE-P from AT&T." *Reconsideration Order* ¶ 6 (A. Vol. V, Tab N, 2); *accord* Br. 3. Shortly before the FCC issued its remand order, anticipating that the FCC would no longer require incumbent carriers to offer the UNE-P, "[Saturn] and AT&T began discussing reconfiguring [Saturn's] network." *Reconsideration Order* ¶ 6 (A. Vol. V, Tab N, 2); *accord* Further Revised Joint Statement of Undisputed Facts ¶ 19 (S.A. Tab 3, 6) (July 16, 2010) (Joint Statement). As a component of the new network, "AT&T offered [Saturn] a special access transport facility called a 'SmartRing.'" *Reconsideration Order* ¶ 6 (A. Vol. V, Tab N, 2); *see* Formal Complaint ¶¶ 22, 26, 28 (A. Vol. I, Tab A, 13–15) (July 20, 2009). During the parties' preliminary discussions, AT&T informed Saturn that it could connect Saturn's existing UNE-P customers to the SmartRing using varieties of "off-the-shelf" unbundled loops (known specifically as "UCL-ND" or "SL1" loops, and more generally as "nondesigned" loops) that would be cost-effective because AT&T would not need to customize them for

Saturn's network. *See Reconsideration Order* ¶ 6 & n.11 (A. Vol. V, Tab N, 2, 7); Formal Complaint ¶ 16 (A. Vol. I, Tab A, 10–11).

Shortly before the parties formally began negotiating a new interconnection agreement in March 2006, AT&T changed course, informing Saturn that it was technically infeasible to combine, or "commingle," such off-the-shelf loops with the SmartRing. *See Reconsideration Order* ¶ 6 (A. Vol. V, Tab N, 2); Joint Statement ¶ 177 (S.A. Tab 3, 45); Emergency Petition of Saturn against BellSouth to Require BellSouth to Honor Commitments and to Prevent Anticompetitive and Monopolistic Behavior ¶ 44 (A. Vol. I, Tab C, 13) (June 5, 2006) (FPSC Petition). Instead, to operate a network with the SmartRing, Saturn would have to lease more expensive customized (or "designed") loops known as "SL2s." *See Reconsideration Order* ¶ 6 (A. Vol. V, Tab N, 2); FPSC Petition ¶¶ 44, 47 (A. Vol. I, Tab C, 13).[3]

Saturn was unhappy with AT&T's revised position. *See* FPSC Petition ¶¶ 43–55 (A. Vol. I, Tab C, 13–15). It also grew concerned that AT&T had no automated process in place to convert Saturn's existing UNE-P customers to the new, commingled network. *See id.*; *accord Reconsideration Order* ¶ 6

[3] All of the loops discussed above are forms of "DS-0" loops, "voice-grade digital channel[s] of 64 Kbps." *Order* ¶ 6 n.18 (A. Vol. IV, Tab L, 14); *see* Formal Complaint ¶ 46 n.57 (A. Vol. I, Tab A, 19).

(A. Vol. V, Tab N, 2). Accordingly, in June 2006, Saturn complained about AT&T's conduct to both the Florida Commission and the FCC, which was at that time considering the proposed AT&T Inc.-BellSouth Corp. merger. *Reconsideration Order* ¶ 7 (A. Vol. V, Tab N, 2); *see generally* FPSC Petition (A. Vol. I, Tab C); Saturn's Comments on Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corp. (A. Vol. I, Tab D) (FCC Comments).

Saturn's allegations in each forum were essentially the same. *See Order* ¶¶ 26 n.87, 28 n.93 (A. Vol. IV, Tab L, 17, 18). "[Saturn] asserted that AT&T's refusal to allow SL1 commingling in accordance with the original network design violated the *TRO*, was fraudulent, deceptive, in bad faith, and aimed at driving [Saturn] out of business." *Reconsideration Order* ¶ 7 (A. Vol. V, Tab N, 2) (citations omitted). Saturn further "alleged that AT&T [had] violated the *TRRO* by failing to provide bulk migration or some other method of migrating [Saturn's] UNE-P base of customers [to Saturn's commingled network] in a timely and profitable manner." *Id.*; *see also id.* ¶ 7 n.18 (A. Vol. V, Tab N, 8) (citing relevant portions of the FPSC Petition); FCC Comments ¶¶ 6, 9–11, 13–15, 31, 42–43 (A. Vol. I, Tab D, 2–5, 10, 13) (making equivalent allegations to the FCC).

In July 2006, Saturn and AT&T engaged in mediation, after which they executed a term sheet (Term Sheet) that provided a framework for resolving their pending disputes. *See generally* Term Sheet (A. Vol. II, Tab G) (executed July 12, 2006). Among other things, the parties agreed (1) "to negotiate in good faith to attempt to resolve all outstanding issues by September 1, 2006;" (2) that Saturn would immediately withdraw its pleadings in the *2006 Proceedings* and not refile them in any forum while the parties negotiated their settlement; and (3) that, "[u]pon resolution of all [outstanding] issues . . . and execution of a new [interconnection agreement]," both parties would "release each other for all claims, known or unknown, relating to" Saturn's FPSC Petition and FCC Comments. *See id.* ¶¶ 1, 3–4, 8 (A. Vol. II, Tab G, 1).

Saturn and AT&T entered into their new Interconnection Agreement on November 1, 2006. *See Reconsideration Order* ¶ 9 (A. Vol. V, Tab N, 2); Interconnection Agreement Signature Page (S.A. Tab 5, ATT144197) (executed by Saturn on October 23, 2006, and by AT&T on November 1, 2006). As both parties agree, that agreement "does not obligate AT&T to provide SL1 commingling." *Id.*; *see* Br. 35. Although the parties also agree that the agreement addresses migration services, *e.g.*, AT&T's Legal Analysis 25–26 (A. Vol. II, Tab F, 25–26) (Sept. 4, 2009); *see* Br. 35, they disagree as

to whether the agreement obligates AT&T to provide bulk migration for Saturn's UNE-P customer base, *e.g.*, *Reconsideration Order* ¶ 9 (A. Vol. V, Tab N, 2); *see* Br. 35; AT&T's Legal Analysis 26–27, 55 (A. Vol. II, Tab F, 26–27, 55). Finally, the agreement provides that "if any dispute arises as to" the agreement's "interpretation . . . or . . . proper implementation," the Florida Commission is the exclusive forum for "resolution of the dispute." Interconnection Agreement § 8 (A. Vol. II, Tab G-1).

On November 8, 2006, days after executing the Interconnection Agreement, Saturn and AT&T signed their Settlement Agreement. *See Reconsideration Order* ¶ 9 (A. Vol. V, Tab N, 2); Settlement Agreement 1 (A. Vol. I, Tab B, 1). Among other things, AT&T pledged in the Settlement Agreement to make "reasonable efforts" to convert a portion (2,500) of Saturn's existing UNE-P customers to the new, commingled network using an automated "bulk migration work-around process." Settlement Agreement "Obligations" ¶ 13 (A. Vol. I, Tab B, 4–5).

The Settlement Agreement included three other provisions that are now significant. First, with respect to the FPSC Petition and FCC Comments—which Saturn had earlier "withdrawn . . . without prejudice"—Saturn agreed "not to re-file [either of those pleadings] or the allegations raised in or associated with [them]" before the Florida Commission, the FCC, "or in any

other forum." Settlement Agreement "Obligations" ¶¶ 5, 6 (A. Vol. I, Tab B, 3). Second, Saturn "release[d], acquit[ted], and discharge[d] [AT&T] from all Demands, Actions, and Claims, whether known or unknown, asserted or which could have been asserted, against [AT&T] related to" the FPSC Petition or FCC Comments. *Id.* Third, the parties defined the "Demands, Actions, and Claims" covered by Saturn's release as follows:

> **"Demands, Actions, and Claims"** means all . . . controversies, suits, actions, causes of action, rights of action, . . . damages, claims, demands [and] rights . . . of any kind or sort whatsoever or howsoever or *whenever arising*, in law or in equity, *whether known or unknown*, . . . that *relate to* the claims set forth by [Saturn] in the [FCC Comments] and the [FPSC Petition]."

Id. "Definitions" ¶ 8 (A. Vol. I, Tab B, 2–3) (emphasis added).

C. Saturn's Suit against AT&T in Federal District Court

After the parties executed the Interconnection and Settlement Agreements, "AT&T migrated approximately 85 of [Saturn's] existing UNE-P customers to the commingled arrangement using SL2 loops." *Reconsideration Order* ¶ 10 (A. Vol. V, Tab N, 3); *see* Br. 9. In June 2008, complaining "that the migration process was slow, unwieldy[,] and expensive, and that . . . customers suffered outages and other inconvenience," *Reconsideration Order* ¶ 10 (A. Vol. V, Tab N, 3), Saturn filed suit against AT&T in the U.S. District Court for the Northern District of Florida, *id.* ¶ 11 (A. Vol. V, Tab N, 3); *see* Joint Statement ¶ 137 (S.A. Tab 3, 35).

Saturn "alleged [in district court] that AT&T had breached the Settlement Agreement by failing to convert [all] 2,500" of Saturn's existing customer lines that were designated in the agreement for bulk migration. *Reconsideration Order* ¶ 11 (A. Vol. V, Tab N, 3). In addition, Saturn claimed "that AT&T had fraudulently induced [it] to enter the Settlement Agreement" and had "violated the [Interconnection Agreement]." *Id.*; *accord* Br. 11. The district court dismissed the latter two claims, holding there was no fraudulent inducement as a matter of Florida law, and that the Florida Commission was the appropriate forum for disputes concerning the Interconnection Agreement. *See Reconsideration Order* ¶ 11 (A. Vol. V, Tab N, 3); Br. 11–12. Saturn thereafter dismissed its district court complaint and instead filed a formal complaint (Formal Complaint) with the FCC. *Reconsideration Order* ¶ 12 (A. Vol. V, Tab N, 3); *see* 47 U.S.C. § 208.

D. The FCC Proceedings

Saturn's Formal Complaint includes thirteen counts based on overlapping allegations. In Counts 1 through 9, Saturn claims that, in refusing to allow commingling of off-the-shelf, voice-grade loops (the so-called "nondesigned DS-0 loops"), and instead requiring Saturn to lease more expensive "SL2" loops, AT&T violated Sections 201(a), 201(b), 202(a), 251(c)(2)(B)–(D), 251(c)(3), and 271(c)(2)(B) of the Act. *See* Br. 14–16;

Formal Complaint ¶¶ 155–257 (A. Vol. I, Tab A, 52–85). In Counts 11 and 12,[4] Saturn claims that AT&T's failure to provide an automated, "bulk-migration" process for Saturn's existing UNE-P customers violated Sections 202(a) and 251(c)(2)(C). *See* Br. 16–17; Formal Complaint ¶¶ 261–284 (A. Vol. I, Tab A, 86–93).[5] Finally, Saturn claims in Count 13 that by representing—falsely, in Saturn's view—that commingling off-the-shelf loops with the SmartRing is technically infeasible, AT&T failed to negotiate the Interconnection Agreement in good faith and thus violated Section 251(c)(1). *See* Br. 17; Formal Complaint ¶¶ 285–295 (A. Vol. I, Tab A, 93–96).

1. *Order*

In the 2013 *Order*, acting under delegated authority, the FCC's Enforcement Bureau dismissed the Formal Complaint with prejudice on the basis that all of Saturn's claims are barred by the release in the Settlement Agreement. *See Order* ¶¶ 1–2 (A. Vol. IV, Tab L, 1). For each set of Saturn's

[4] Saturn has abandoned Count 10 of the Formal Complaint. Br. 16.

[5] Saturn asserts that its Formal Complaint did not concern bulk migration for the 2,500 existing customers referenced in the Settlement Agreement, *see* Br. 13 n.6, but only the remaining portion of Saturn's existing customer lines, *see id.* at 10, and any "new" customers later acquired, *e.g.*, *id.* at 16–17. Because Saturn does not explain how "migration" is an issue that could affect new customers, this brief's discussion of Saturn's migration claims will not separately address new customers. The inclusion of new customers would not, however, affect the relevant legal analysis.

claims, the Bureau compared Saturn's allegations in the *2006 Proceedings* to allegations in the Formal Complaint, concluding based on that analysis that Saturn's current claims are "clearly 'related to' (or the same as) claims that [Saturn] 'asserted' or 'could have . . . asserted' in the [*2006 Proceedings*]." *Id.* ¶ 26 (A. Vol. IV, Tab L, 5); *accord id.* ¶ 28 (A. Vol. IV, Tab L, 6); *see id.* ¶ 27 & nn.88–89 (A. Vol. IV, Tab L, 5, 17) (identifying allegations in the *2006 Proceedings* equivalent to those underlying Counts 1 through 9 and Count 13); *id.* App'x A, Part III (A. Vol. IV, Tab L, 11–13) (same); *id.* ¶¶ 28 & n.93, 29 (A. Vol. IV, Tab L, 6, 18) (doing the same for Counts 11 and 12); *id.* App'x A, Part IV (A. Vol. IV, Tab L, 13–14) (same).

The Bureau rejected Saturn's contention that its claims concern "post-Settlement Agreement conduct" beyond the scope of the release. *Order* ¶ 30 (A. Vol. IV, Tab L, 6); *see id.* ¶¶ 31–40 (A. Vol. IV, Tab L, 6–8). To begin with, the Bureau found, most of the allegations in the Formal Complaint "concern conduct that originated before the Settlement Agreement was executed"—including negotiation of the parties' Interconnection Agreement. *Id.* ¶ 32 (A. Vol. IV, Tab L, 6). Moreover, the Bureau explained, what allegations do concern post-settlement conduct center on "AT&T's alleged non-compliance with . . . the Settlement Agreement itself," which is not

legally significant when Saturn "has expressly disavowed any claim" based on breach of that agreement. *Id.* ¶ 33 (A. Vol. IV, Tab L, 6).

"[M]ore fundamentally," the Bureau explained, Saturn's defense ignores language in the release that unambiguously bars Saturn from asserting that AT&T is "continu[ing] [to] violat[e] the law" by virtue of the policies challenged in the *2006 Proceedings*. *Order* ¶ 34 (A. Vol. IV, Tab L, 6) (internal quotation marks omitted; alterations in original). Saturn already alleged, in the earlier proceedings, that AT&T is obligated to commingle Saturn's preferred, off-the-shelf loops and provide "a bulk migration process for converting former UNE-P customers to commingled arrangements." *Id.* AT&T disagreed, and "the parties settled." *Id.* Saturn now alleges that AT&T has continued to adhere to its pre-settlement policies. *See id.* (A. Vol. IV, Tab L, 6–7). Claims based on such allegations, the Bureau determined, are barred when Saturn has released AT&T from "all demands, actions, and claims—'howsoever [or] whenever arising'—that 'relate to' claims in the [*2006 Proceedings*]." *Id.* (A. Vol. IV, Tab L, 6) (quoting Settlement Agreement "Definitions" ¶ 8 (A. Vol. I, Tab B, 2–3)).

The Bureau also rejected Saturn's "suggestion that AT&T's alleged failure to migrate the 2,500 lines under the Settlement Agreement automatically extinguished [Saturn's] obligation to abide by the Agreement,

including the release." *Order* ¶ 43 (A. Vol. IV, Tab L, 8). Saturn identified "no Florida law," the Bureau held, that would mandate that result. *Id.*; *see Order* ¶ 43 n.128 (A. Vol. IV, Tab L, 20). Indeed, the Bureau explained, this Court's decision in *Farese v. Scherer*, 297 F. App'x 923 (11th Cir. 2008) (per curiam), "supports the opposite conclusion." *Order* ¶ 43 (A. Vol. IV, Tab L, 8).

2. *Reconsideration Order*

Saturn sought review of the *Order* by the full Commission. *See* Saturn's Appeal for Full Commission Review or in the Alternative Motion for Reconsideration 1 (A. Vol. V, Tab M, 1) (Motion for Reconsideration). In doing so, Saturn principally repeated its earlier arguments that the release in the Settlement Agreement does not cover claims against AT&T for post-settlement conduct. *See id.* at 7–19 (A. Vol. V, Tab M, 7–19). Saturn abandoned the argument that AT&T's alleged breach of the Settlement Agreement automatically excused Saturn from honoring the release. *See id.* at 19–20 (A. Vol. V, Tab M, 19–20).

The Commission denied reconsideration. *See Reconsideration Order* ¶¶ 2, 27 (A. Vol. V, Tab N, 1, 6). The Commission agreed with the Bureau that all of Saturn's claims in the Formal Complaint "'relate[] to' claims that [Saturn] 'asserted' or 'could have . . . asserted' in the *2006 Proceedings*." *Id.*

¶ 14 (A. Vol. V, Tab N, 3); *see id.* ¶ 18 (A. Vol. V, Tab N, 4). In addition, the Commission held that, because each of Saturn's claims depends on "essentially the same allegations" raised in the *2006 Proceedings*, *id.* ¶ 15 (A. Vol. V, Tab N, 4), the claims are barred by Saturn's pledge, in the Settlement Agreement, not to "re-file the allegations raised in or associated with the [*2006 Proceedings*]" in any forum, *id.* ¶ 15 (alteration in original; internal quotation marks omitted); *accord id.* ¶ 18 (A. Vol. V, Tab N, 4).

Like the Bureau, the Commission rejected Saturn's argument that the Formal Complaint centers on post-settlement conduct beyond the scope of the release. *See Reconsideration Order* ¶¶ 16, 19 (A. Vol. V, Tab N, 4–5). As to Count 13 (bad faith negotiation of the Interconnection Agreement), the analysis was simple: That claim could not involve post-settlement conduct because the Interconnection Agreement was executed before the Settlement Agreement. *See id.* ¶ 16 (A. Vol. V, Tab N, 4). As to Counts 1 through 9 (failure to commingle off-the-shelf loops) and Counts 11 and 12 (failure to implement a bulk-migration process for existing UNE-P customers), the Commission held that Saturn was mistaken to focus solely on the timing of AT&T's conduct underlying those claims. *See id.* ¶ 19 (A. Vol. V, Tab N, 4–5). What mattered was whether the claims had accrued or matured prior to the Settlement Agreement—and they necessarily had, for Saturn had claimed

from the outset of the *2006 Proceedings* that "AT&T was obligated to provide SL1 commingling and an effective means of migrating customers." *Id.*; *see id.* ¶ 17 (A. Vol. V, Tab N, 4).

The Commission also set forth alternative, independent grounds for rejecting all but Count 13 of Saturn's Formal Complaint. *See Reconsideration Order* ¶¶ 21, 24 (A. Vol. V, Tab N, 5–6). First, because the Interconnection Agreement addressed AT&T's commingling and bulk-migration obligations, Saturn could not properly bring a direct challenge concerning those issues under Section 251 of the Act. *See id.* ¶¶ 21–22 (A. Vol. V, Tab N, 5). That is so, the Commission explained, because rights under Section 251(c)(2) and (3) are "not self-executing;" they are effectuated through interconnection agreements. *Id.* ¶ 21 (A. Vol. V, Tab N, 5). Thus, in the Commission's view, Saturn may not bring direct statutory claims under Section 251(c)(2) or (3). *See id.* Saturn may only seek to show that "AT&T is in breach of the [Interconnection Agreement]"—a question the agreement's forum-selection clause reserves to the Florida Commission. *Id.*; *see id.* ¶ 22 (A. Vol. V, Tab N, 5).

Second, the Commission determined, "because [Saturn's] Section 271 . . . claims are premised entirely on AT&T's alleged violation of Section 251 . . . , these claims, too, can succeed only if AT&T has breached the

[Interconnection Agreement]." *Reconsideration Order* ¶ 21 (A. Vol. V, Tab N, 5). In other words, the Commission held that unless and until the Florida Commission finds that AT&T breached its Section 251 obligations as embodied in the Interconnection Agreement, the FCC has no cause to find a violation of Section 271. *See id.* ¶¶ 21, 23 (A. Vol. V, Tab N, 5–6).

Finally, the Commission held that Saturn failed to state a claim under Sections 201 or 202(a). *See Reconsideration Order* ¶ 24 (A. Vol. V, Tab N, 6). Violations of those provisions must have a nexus with "interstate" or "foreign communication." *Id.* (internal quotation marks omitted). But here, the Commission explained, the sole basis of Saturn's Section 201 and 202(a) claims is "AT&T's alleged failure to comply with its unbundling obligations," and, under settled precedent, "the provision of an unbundled network element is not the provision of a telecommunications service." *Id.* (internal quotation marks omitted).

SUMMARY OF ARGUMENT

1. In the Settlement Agreement, Saturn pledged never to "re-file . . . the allegations raised in or associated with" its FPSC Petition or FCC Comments in any forum. Settlement Agreement "Obligations" ¶¶ 5–6 (A. Vol. I, Tab B, 3). Saturn also released AT&T from all claims "related to" those pleadings that were "asserted or . . . could have been asserted" in the *2006 Proceedings*.

Id. In the decisions on review, the FCC compared Saturn's allegations in the Formal Complaint to those in Saturn's 2006 pleadings and found that Saturn's current claims and allegations are the same as, or closely related to, its earlier ones. The FCC therefore dismissed the Formal Complaint pursuant to the Settlement Agreement. That decision was correct.

2. None of Saturn's several arguments as to why the FCC should not have applied the Settlement Agreement is persuasive.

a. Saturn's principal defense is that the Formal Complaint is limited to post-settlement conduct. As a factual matter, that is incorrect. In particular, the record is clear that negotiations of the Interconnection Agreement ended before the parties signed the Settlement Agreement. Moreover, whether Saturn's claims involve post-settlement conduct is not dispositive. What matters is when a claim accrues, and the FCC correctly concluded that, here, Saturn's claims accrued before the settlement.

b. Saturn also argues unpersuasively that, if the release in the Settlement Agreement encompasses the claims in the Formal Complaint, the release immunizes AT&T from future violations of law and thus is void as contrary to public policy. That argument ignores Saturn's undisputed ability to bring claims against AT&T in federal district court for violation of the Settlement Agreement, or before the Florida Commission for breach of the

Interconnection Agreement. Although Saturn may prefer to seek relief from the FCC, that is no basis to void the release.

c. Finally, Saturn seeks to escape the release on a theory that AT&T committed a material breach of the Settlement Agreement by failing to convert 2,500 of Saturn's existing customers to the comingled network using a bulk-migration process. Saturn failed to exhaust that argument when requesting full-Commission review of the Enforcement Bureau's *Order*, as the Communications Act requires. *See* 47 U.S.C. § 405(a). This Court thus lacks jurisdiction to consider Saturn's argument. In any event, the argument is unfounded. Under Florida law, a party seeking to avoid a release must tender the return of whatever it received in exchange for that release. But Saturn obtained billing credits under the Settlement Agreement that it has never returned.

3. Independent of the Settlement Agreement, the FCC reasonably concluded that the Interconnection Agreement forecloses Saturn's commingling and bulk-migration claims under Sections 251 and 271 of the Act (Counts 1, 5 through 7, 9, and 11). Under the framework established by the 1996 Act, an incumbent carrier's duties under Section 251(c)(2) and (3) are implemented through interconnection agreements. Thus, a competitive carrier that enters into an interconnection agreement addressing an

incumbent's duty to provide unbundled network elements or migration services, for example, may not later bring direct statutory claims concerning those issues instead of seeking to enforce the agreement. That is what Saturn has attempted to do here, and the FCC thus correctly rejected the Section 251 commingling and bulk-migration claims. In addition, the FCC reasonably concluded that when Saturn's Section 271 claims merely duplicate its Section 251 claims, and when the Florida Commission has made no finding that AT&T violated the Interconnection Agreement, there are no commingling or bulk-migration duties in effect for the FCC to enforce under Section 271.

4. Saturn also argues unpersuasively that, even if AT&T's commingling and migration obligations under Sections 251 and 271 are governed by the Interconnection Agreement, the FCC should have decided Saturn's claims without regard for the agreement's forum-selection clause reserving disputes to the Florida Commission. As the FCC correctly determined, setting aside a forum-selection clause requires a compelling justification, which Saturn has not shown.

5. Finally, as an independent basis for rejecting Saturn's claims under Sections 201 and 202(a) of the Act (Counts 2 through 4, 8, and 12), the FCC reasonably determined that Saturn has failed to allege the statutorily required nexus with interstate or foreign communication services. The FCC correctly

found that the sole basis for Saturn's Section 201 and 202(a) claims is AT&T's alleged failure to comply with its unbundling obligations, and the provision of an unbundled network element is not the provision of a telecommunications service.

STANDARDS OF REVIEW

The interpretation of a settlement agreement is a matter of contract law that this Court reviews de novo. *E.g.*, *In re Managed Care*, 756 F.3d 1222, 1232 (11th Cir. 2014); *see also Rucker v. Oasis Legal Fin., L.L.C.*, 632 F.3d 1231, 1235 (11th Cir. 2011) (applying de novo review to the dismissal of a lawsuit on the basis of a contractual forum-selection clause). Insofar as Saturn challenges the FCC's interpretation of Sections 201, 202(a), 251, and 271 of the Communications Act, the Court should apply the framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *E.g.*, *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003) (en banc). To the extent the Act is "silent or ambiguous" on an issue, the Court must defer to the FCC's "permissible construction of the statute." *Chevron*, 467 U.S. at 843.

ARGUMENT

I. THE SETTLEMENT AGREEMENT BARS SATURN'S CLAIMS.

Florida "law is clear that principles governing general contract law apply to interpret[ing] settlement agreements." *Managed Care*, 756 F.3d at 1232 (internal quotation marks and alteration omitted).[6] This Court should therefore consider the "plain meaning" of Saturn's release, *e.g.*, *Sheen v. Lyon*, 485 So. 2d 422, 424 (Fla. 1986), in the context of the Settlement Agreement as a whole, *see In re Chira*, 567 F.3d 1307, 1311 (11th Cir. 2009).

There is no dispute which provisions of the Settlement Agreement are controlling. *See Order* ¶ 25 (A. Vol. IV, Tab L, 5); Br. 8. Under the heading "Obligations," paragraphs 5 and 6 provide that Saturn "releases" AT&T "from all Demands, Actions, and Claims . . . asserted or which could have been asserted" in 2006 "related to" the FPSC Petition or FCC Comments. Settlement Agreement "Obligations" ¶¶ 5–6 (A. Vol. I, Tab B, 3). Those same paragraphs further provide that, having dismissed the FPSC Petition and FCC Comments upon executing the Term Sheet, Saturn agrees "not to re-file . . . allegations raised in or associated with [those pleadings]" before the FCC

[6] When, as here, a settlement agreement includes a choice-of-law clause electing Florida law, this Court honors that election when interpreting releases of federal statutory claims. *E.g.*, *Managed Care*, 756 F.3d at 1232 & n.7; *see Mergens v. Dreyfoos*, 166 F.3d 1114, 1117 n.1 (11th Cir. 1999).

("or in any other forum"). *Id.* Finally, paragraph 8 of the Settlement Agreement's "Definitions" section specifies that the "Demands, Actions, and Claims" covered by Saturn's release include "all . . . claims . . . of any kind or sort . . . *whenever arising* . . . that *relate to* the claims set forth" in the *2006 Proceedings*. *Id.* "Definitions" ¶ 8 (A. Vol. I, Tab B, 2–3) (emphasis added). These provisions bar Saturn's Formal Complaint, as explained further below.

A. Count 13: Bad Faith Negotiation

The FCC correctly determined that the Settlement Agreement bars Saturn's claim that AT&T "fail[ed] to negotiate the [Interconnection Agreement] in good faith" because that claim "'relate[s] to' claims that [Saturn] 'asserted' or 'could have . . . asserted' in the *2006 Proceedings*." *Reconsideration Order* ¶ 14 (A. Vol. V, Tab N, 3); *see Order* ¶ 27 (A. Vol. IV, Tab L, 5–6). Just as the Formal Complaint asserts that AT&T violated Section 251(c) by representing falsely (in Saturn's view) that it is technically infeasible to commingle off-the-shelf loops, *e.g.*, Formal Complaint ¶¶ 285, 288, 292, 294 (A. Vol. I, Tab A, 93–95), Saturn argued to the Florida Commission in 2006 that AT&T's "commingling rules" requiring the use of customized loops were "arbitrary," FPSC Petition ¶ 49 (A. Vol. I, Tab C, 14), that AT&T acted "in bad faith," *id.* ¶ 61 (A. Vol. I, Tab C, 16), and that AT&T violated Section 251(c), *see id.* ¶ 60 (A. Vol. I, Tab C, 16).

Moreover (and independently), because the allegations on which Count 13 depends largely mirror Saturn's allegations in the *2006 Proceedings*, the claim is barred by Saturn's pledge not to "re-file the allegations raised in or associated with [those proceedings]." *Reconsideration Order* ¶ 15 (A. Vol. V, Tab N, 4). For example, as already noted, when Saturn alleged in the Formal Complaint that AT&T had falsely represented it was technically infeasible to commingle off-the-shelf loops, *e.g.*, Formal Complaint ¶¶ 285, 287–89 (A. Vol. I, Tab A, 93–94), Saturn effectively "refiled" its 2006 assertions that AT&T's "commingling rules" were "arbitrary," FPSC Petition ¶ 49 (A. Vol. I, Tab C, 14), and "unfair[]," FCC Comments ¶ 43 (A. Vol. I, Tab D, 13). Saturn's FPSC Petition and the Formal Complaint both emphasize that AT&T had initially assured Saturn that off-the-shelf loops *could* be used for commingling. *Compare* FPSC Petition ¶ 50 (A. Vol. I, Tab C, 14), *with* Formal Complaint ¶¶ 58, 68 (A. Vol. I, Tab A, 23, 26). Finally, Saturn alleged in both sets of pleadings that, when requiring the higher-cost loops, AT&T acted with anticompetitive intent. *Compare* FPSC Petition ¶¶ 51, 54 (A. Vol. I, Tab C, 14–15), *and* FCC Comments ¶ 43 (A. Vol. I, Tab D, 13), *with* Formal Complaint ¶ 291 (A. Vol. I, Tab A, 95).

B. Counts 11 and 12: Failure to Conduct Bulk Migration

As the FCC correctly determined, the same provisions of the Settlement Agreement that bar Count 13 also foreclose Saturn's claims, in Counts 11 and 12, that AT&T unlawfully failed to implement a bulk-migration process for Saturn's existing UNE-P customers. *See Reconsideration Order* ¶ 18 (A. Vol. V, Tab N, 4); *Order* ¶ 28 (A. Vol. IV, Tab L, 6). Comparing "the key allegations of the [Formal] Complaint with representative allegations from [Saturn's] FPSC [Petition] shows that" Saturn's current and former claims concern "essentially the same conduct." *Id.* (citations omitted).

For example, Saturn asserted in both sets of proceedings that it asked AT&T about bulk or "profitable" migration of its embedded customer base beginning in January 2005. *Compare* Formal Complaint ¶ 31 (A. Vol. I, Tab A, 16), *with* FPSC Petition ¶ 8 (A. Vol. I, Tab C, 6). Saturn also complained in both sets of proceedings that after initially assuring Saturn bulk migration would be possible, *see* Formal Complaint ¶¶ 45, 274 (A. Vol. I, Tab A, 19, 89); FPSC Petition ¶ 23 (A. Vol. I, Tab C, 9), AT&T in February or March of 2006 changed course, telling Saturn that only manual conversion was feasible, *see* Formal Complaint ¶¶ 75, 263 (A. Vol. I, Tab A, 28, 87); FPSC Petition ¶ 43 (A. Vol. I, Tab C, 13).

Similarly, in both sets of proceedings, Saturn alleged that the manual process was more expensive, disrupted service to customers, and was designed to increase barriers to entry for Saturn and drive Saturn out of business. *See* Formal Complaint ¶¶ 262–263, 265, 281, 284 (A. Vol. I, Tab A, 86–88, 91–93); FPSC Petition ¶¶ 6, 53, 54 (A. Vol. I, Tab C, 6, 15); *id.* Prayer for Relief ¶¶ 3–4 (A. Vol. I, Tab C, 18). Saturn also alleged in both sets of proceedings that AT&T's failure to provide bulk migration was unlawful. *See* Formal Complaint ¶¶ 280, 283 (A. Vol. I, Tab A, 91–92); FPSC Petition ¶ 59 (A. Vol. I, Tab C, 16). And in both sets of proceedings, Saturn asked that AT&T be required to conduct the "seamless" migration it had originally promised. *See* Formal Complaint ¶ 284 (A. Vol. I, Tab A, 93); FPSC Petition ¶ 6 (A. Vol. I, Tab C, 6); *id.* Prayer for Relief ¶ 2 (A. Vol. I, Tab C, 17).

C. Counts 1 through 9: Refusal to Permit Commingling of Off-the-Shelf Loops

Finally, the FCC correctly determined that the Settlement Agreement bars Saturn's claims, in Counts 1 through 9, that AT&T unlawfully and with anticompetitive intent refused to incorporate off-the-shelf loops in Saturn's commingled network. *See Reconsideration Order* ¶ 18 (A. Vol. V, Tab N, 4); *Order* ¶¶ 26–27 (A. Vol. IV, Tab L, 5).

As with Saturn's other claims, the key allegations regarding commingling are effectively the same in both sets of proceedings. In 2006 and in the Formal Complaint, Saturn asserted that AT&T had initially offered to permit commingling with inexpensive, off-the-shelf loops so as to induce Saturn to lease AT&T's expensive, special access SmartRing. *See* Formal Complaint ¶¶ 162–163 (A. Vol. I, Tab A, 53–54); FPSC Petition ¶ 26 (A. Vol. I, Tab C, 9). Saturn also made clear in both sets of proceedings that AT&T's offer of less-expensive loops—and Saturn's contention that AT&T should honor that offer—concerned both Saturn's existing UNE-P customers and any new customers Saturn might acquire in the future. *See* Formal Complaint ¶ 162 (A. Vol. I, Tab A, 53–54); FPSC Petition ¶¶ 33, 46 (A. Vol. I, Tab C, 11, 13). Saturn complained in both sets of proceedings that AT&T changed its position in February or March 2006, allowing Saturn to commingle only the costlier, customized loops. *See* Formal Complaint ¶ 72 (A. Vol. I, Tab A, 27); FPSC Petition ¶ 44 (A. Vol. I, Tab C, 13). And in both sets of proceedings, Saturn alleged that AT&T's revised policy was unlawful, *e.g.*, Formal Complaint ¶¶ 206, 209, 212, 215, 218, 221, 250, 253, 256 (A. Vol. I, Tab A, 68–74, 81–84); FPSC Petition ¶ 62 (A. Vol. I, Tab C, 16), and that AT&T anticompetitively aimed to raise Saturn's barriers to entry,

e.g., Formal Complaint ¶¶ 163, 175, 187, 192 (A. Vol. I, Tab A, 54, 58, 62–64); FPSC Petition ¶ 47 (A. Vol. I, Tab C, 13).

* * * * *

As the above examples illustrate, all of the claims in Saturn's Formal Complaint "relate[] to" claims that Saturn "could have . . . asserted" (or did assert) in 2006. Settlement Agreement "Obligations" ¶¶ 5, 6 (A. Vol. I, Tab B, 3). They also uniformly depend on allegations "raised in or associated with the [*2006 Proceedings*]." *Id.* It is therefore clear, from the plain language of the Settlement Agreement, that Saturn released its current claims. The FCC properly dismissed them.

II. SATURN CANNOT AVOID THE RELEASE.

A. Saturn Cannot Avoid the Release by Characterizing Its Claims as Limited to Post-Settlement Conduct.

In challenging the FCC's determination that the Settlement Agreement bars all claims in the Formal Complaint, Saturn chiefly asserts that those claims are limited to "AT&T's conduct that occurred *after*" the Settlement Agreement. Br. 21; *see id.* at 23–24, 28. As explained below, that contention is unavailing.

1. Most or All of the Conduct at Issue Pre-Dates the Settlement Agreement.

To begin with, as a factual matter, most if not all of Saturn's allegations concern AT&T's conduct prior to the Settlement Agreement. *Order* ¶ 32 (A. Vol. IV, Tab L, 6).

As to Count 13 (bad faith negotiation of the Interconnection Agreement), Saturn cannot plausibly contend there is relevant post-settlement conduct. Negotiations concerning the Interconnection Agreement were already underway when Saturn made its filings in the *2006 Proceedings*. *See, e.g.*, Joint Statement ¶ 177 (S.A. Tab 3, 45) (indicating that negotiations commenced in March 2006). Those negotiations concluded (and the Interconnection Agreement was executed) before the parties signed the Settlement Agreement. *Compare* Interconnection Agreement Signature Page (S.A. Tab 5, ATT144197) (executed October 23 and November 1, 2006), *with* Settlement Agreement 1 (A. Vol. I, Tab B, 1) (executed November 8, 2006).[7]

[7] To the extent Saturn suggests (Br. 24) that negotiations of the Interconnection Agreement continued past the date of the Settlement Agreement, Saturn incorrectly conflates the parties' July 12, 2006, Term Sheet with the Settlement Agreement itself. The date of the Settlement Agreement, not the Term Sheet, is what matters here. In any event, the record reflects that even before the *2006 Proceedings* (and thus before the Term Sheet), Saturn already questioned AT&T's good faith and the veracity of

As for the remaining claims (Counts 1 through 9, concerning AT&T's refusal to commingle off-the-shelf loops, and Counts 11 and 12, concerning bulk migration), Saturn repeatedly asserts—but nowhere substantiates—that "[t]he *Formal Complaint* addresses . . . unlawful conduct of AT&T that occurred after the mediated settlement." Br. 24; *see id.* at 23, 29–30. Saturn's failure to cite any specific portions of the Formal Complaint that would support such assertions is telling. It is particularly telling when the FCC expressly found that, to the extent the Formal Complaint does "address post-Settlement conduct," the allegations in question center on "AT&T's alleged non-compliance with the bulk migration obligations contained in the Settlement Agreement itself"—conduct on which Saturn "has expressly disavowed" reliance. *Order* ¶ 33 (A. Vol. IV, Tab L, 6); *see id.* ¶ 33 n.98 (A. Vol. IV, Tab L, 18).

2. Saturn's Claims Accrued Prior to the Settlement Agreement.

More fundamentally—and as the FCC correctly recognized, *see Reconsideration Order* ¶¶ 17, 19 (A. Vol. V, Tab N, 4–5)—when considering the scope of a release of claims that "were or could have been asserted" in settled litigation and that "relate[] to" the earlier-litigated conduct, the

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AT&T's representations that commingling off-the-shelf loops was technically infeasible. *See Order* ¶¶ 9 & nn.28–29, 27 n.91 (A. Vol. IV, Tab L, 2, 15, 18).

relevant inquiry is not whether a plaintiff's new claims involve conduct that post-dates the release, but whether the claims accrued (or matured) beforehand. *Managed Care*, 756 F.3d at 1226; *see id.* at 1239.

Particularly instructive on this point is *Managed Care*, which concerned the scope of a release in a settlement agreement resolving a class action by physicians who alleged that healthcare insurance companies had conspired to underpay them using a specified third-party database. *See Managed Care*, 756 F.3d at 1225 & n.1, 1226. Whereas the settlement agreement expressly released claims against the Blue Cross Blue Shield Association "that might arise in the future . . . based on[] conduct . . . that [was] or could have been alleged" in the settled litigation, a parallel release for WellPoint, Inc. was limited to claims "arising on or before the Effective Date" of the settlement. *Id.* at 1226.

Years later, certain former class members filed new "lawsuits against WellPoint regarding alleged underpayment[s] for the provision of medical services" using the same third-party database. *Managed Care*, 756 F.3d at 1227; *see id.* at 1228. Their suits included federal racketeering, antitrust, and Employee Retirement Income Security Act (ERISA) claims. *See id.* at 1227–28. As to all of those claims, the suits involved conduct that occurred after the settlement of the earlier class action. *See id.* at 1236, 1238.

The timing of that conduct was not dispositive. Although this Court allowed "ERISA claims based on the denial or underpayment of benefits following the [settlement]" to proceed, it did so on the basis that, "for purposes of ERISA[,] a cause of action *does not accrue* until an application for benefits is denied." *Managed Care*, 756 F.3d at 1238 (emphasis added; internal quotation marks and alteration omitted). By contrast, the Court did *not* allow the racketeering or antitrust claims to proceed, holding them barred under the settlement agreement's release. *See id.* at 1235–37. To the extent those claims raised post-settlement conduct, the Court explained, such conduct was "merely . . . a continuation of the conspiracy alleged" in the earlier litigation. *Id.* at 1236. Thus, notwithstanding their allegations of post-settlement conduct, the claims in question "could have been asserted at the time of [settlement]." *Id.*; *accord id.* at 1239; *see also Tisko, P.T. v. Cigna Corp.*, No. 00-MD-1334, 2009 WL 7848519, at *6–8 (conducting an equivalent analysis on related facts), *report and rec. adopted, In re Managed Care Lit.*, No. 00-1334-CIV, 2009 WL 7848639 (S.D. Fla. 2009).

Similarly, courts beyond this Circuit have treated claims that accrued before a release took effect as barred despite allegations of post-release conduct. For example, in *Madison Square Garden, L.P. v. Nat'l Hockey League*, No. 07-cv-8455, 2008 WL 4547518 (S.D.N.Y. 2008)—a case this

Court discussed with approval in *Managed Care*, *see* 756 F.3d at 1239—the court had "little trouble concluding," 2008 WL 4547518, at *6, that a release of claims "relating to, or arising from, any hockey operations or any [National Hockey League (NHL)] activity," *id.* at *5, was intended to bar future challenges to "*policies*" of the NHL that were already in place "at the time of the release," *id.* at *6. Although the plaintiff sought to characterize subsequent claims against the NHL as arising from "post-Release conduct," *id.* (emphasis omitted), the court rejected that theory, holding that the plaintiff's "new" allegations concerned only "the enforcement of [the NHL's] pre-existing policies and" the NHL's post-release decision to reaffirm those policies, *id.*

The decision of the Temporary Emergency Court of Appeals in *Northern Oil Co. v. Standard Oil Co.*, 761 F.2d 699 (Temp. Emer. Ct. App. 1985), offers another example. The court there addressed the scope of a release of claims against Chevron, U.S.A. Inc. that Chevron's customer executed in October 1975 to resolve a dispute that had been preventing the parties from entering into a new supply contract for heating oil. *See id.* at 701–02. The provisions in question "purported to release Chevron from any claims" the customer "may have had stemming from the relationship between the parties under [an earlier, 1973] contract." *Id.* at 702. After the date of the

release, Chevron delivered heating oil for which the customer claimed it was overcharged, and the customer sued. *See id.* at 703, 707. The court held that the customer's claims were barred. *See id.* at 708. Although the alleged overcharges post-dated the release, the customer's claim had accrued earlier, when Chevron made the "purchaser classification" that determined what charges it would assess. *See id.* at 701, 706–07. In effect, the court reasoned, the customer's claim was for "future damages" that arose "from a past violation"—relief the release foreclosed. *Id.* at 707.

Similarly here, as the FCC correctly determined, all of the claims in Saturn's Formal Complaint accrued or matured before the execution of the Settlement Agreement. *See Reconsideration Order* ¶¶ 17, 19 (A. Vol. V, Tab N, 4–5). As already explained, *see supra* p. 38, because the Interconnection Agreement was negotiated and executed before the Settlement Agreement, Saturn's claim for bad faith negotiation necessarily accrued in advance of the release. As to the remaining claims, nowhere has Saturn asserted that, after the date of the Settlement Agreement, AT&T adopted new policies concerning what types of loops it would offer for commingling or what migration processes it would perform. To the contrary, Saturn states that since the parties' settlement, AT&T has "continue[d] to

violate its legal obligations" in the same manner as before. Br. 24; *see id.* at 23–24, 28.

Moreover, it is clear from the language of the FPSC Petition and FCC Comments that Saturn anticipated from the outset of the *2006 Proceedings* that the AT&T policies at issue there would continue to affect Saturn in the future—including when Saturn sought to add new customers to its network. *E.g.*, FPSC Petition ¶¶ 33, 49 (A. Vol. I, Tab C, 11, 14); FCC Comments ¶¶ 23, 43 (A. Vol. I, Tab D, 8, 13–14). Indeed, as the FCC underscored, *see Order* ¶ 35 (A. Vol. IV, Tab L, 7), Saturn expressly asked the Florida Commission to grant relief that would govern AT&T's future conduct, *see* FPSC Petition Prayer for Relief ¶¶ 2, 4, 5 (A. Vol. I, Tab C, 17–18).

Saturn thus is mistaken (Br. 28–29) that the claims in the Formal Complaint are like the waiver-of-insurance-premium claim in *Klein v. John Hancock Mut. Life Ins. Co.*, 683 F.2d 358 (11th Cir. 1982), or the ERISA claims in *Managed Care*, *see* 756 F.3d at 1237–39, which did not accrue until after the settlements at issue in those cases, and which therefore were not released. The Formal Complaint concerns conduct that is "merely . . . a continuation" of the policies at issue in the *2006 Proceedings*. *Id.* at 1236. And as recognized in *Madison Square Garden*, a party's "enforcement of pre-existing policies" is not properly characterized as post-release conduct. 2008

WL 4547518, at *6. In essence, Saturn now seeks "future damages" for AT&T's past determinations concerning what commingling and migration to provide. *Northern Oil*, 761 F.2d at 707. The release in the parties' Settlement Agreement forecloses such claims.[8]

B. The Release Was Not Contrary to Public Policy

Saturn also argues unpersuasively that the release in the Settlement Agreement, to the extent it waived the claims in Saturn's Formal Complaint, is void as contrary to public policy because it immunizes AT&T from "future violations of law." Br. 33; *see id.* at 30–33. Saturn does have recourse in the event of post-settlement misconduct by AT&T. The Settlement and Interconnection Agreements impose continuing commingling and bulk-migration obligations on AT&T. *See Reconsideration Order* ¶ 20 & n.60

[8] Even if Saturn's claims in the Formal Complaint depended on post-settlement conduct and accrued after the settlement date (which they did not), the language of the release was sufficiently broad to bar such claims. *See Order* ¶¶ 34–35 (A. Vol. IV, Tab L, 6–7). Saturn's attempt (Br. 30) to characterize the release at issue here as similar to that in *Farese* ignores that here, unlike in *Farese*, Saturn expressly released all claims "whenever arising" that "relate to the claims set forth" in the *2006 Proceedings*. Settlement Agreement "Definitions" ¶ 8 (A. Vol. I, Tab B, 2–3); *cf. Farese*, 297 F. App'x at 926–27 (holding that a release expressly limited to "any and all *pending* disputes," and which referenced the parties' "*outstanding* differences," did not "bar actions relating to conduct occurring after the agreement was finalized"). Indeed, the release here resembles that obtained by Blue Cross in *Managed Care*, which encompassed later-accruing claims. *See* 756 F.3d at 1226, 1239; *id.* at 1245 (Martin, J., concurring in part and dissenting in part) (interpreting the Blue Cross release to validly "negotiate away future claims").

(A. Vol. V, Tab N, 5, 10); *Order* ¶¶ 37, 40 & n.121 (A. Vol. IV, Tab L, 7–8, 20); Br. 35; Joint Statement ¶ 85 (S.A. Tab 3, 21–22); AT&T's Legal Analysis 25–27 (A. Vol. II, Tab F, 25–27). There is no dispute (barring statute of limitations concerns) that Saturn is free to bring a federal district court action to enforce the Settlement Agreement—as Saturn has previously done. *See* AT&T's Brief in Response to Additional Legal Issues 25 & n.86 (S.A. Tab 2, 25) (Feb. 1, 2011) (AT&T Response Brief); Settlement Agreement "Obligations" ¶ 16 (A. Vol. I, Tab B, 5). Similarly, Saturn may bring claims for violation of the Interconnection Agreement to the Florida Commission. *E.g.*, AT&T's Legal Analysis 26–27, 55 (A. Vol. II, Tab F, 26–27, 55); *see* Interconnection Agreement § 8 (A. Vol. II, Tab, G-1). Although Saturn would apparently prefer to assert statutory claims before the FCC, such a preference "does not warrant a departure from" the release in the Settlement Agreement. *Managed Care*, 756 F.3d at 1239.

Saturn bases its public policy argument in part on *Zinz v. Concordia Props., Inc.*, 694 So. 2d 120 (Fla. Dist. Ct. App. 1997) (per curiam). *See* Br. 30. That reliance is misplaced. *Zinz* holds that to release claims of a party's future negligent conduct in an indemnification agreement, the agreement must expressly mention future negligence. *See* 694 So. 2d at 121. The Florida Supreme Court recently limited that principle to indemnification agreements,

expressly declining to extend it to exculpatory clauses. *See Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256, 270–71 (Fla. 2015) (per curiam). In any event, Saturn has not here alleged post-settlement negligence.

Saturn is also mistaken to rely on *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561 (E.D. Pa. 2001), and *Strube v. American Equity Investment Life Insurance Co.*, 226 F.R.D. 688 (M.D. Fla. 2005) (distinguishing *Schwartz*). Saturn cites those cases for the proposition that although a release may validly bar "later claims of future conduct," the subsequent claims must arise from the "same factual predicate as those claims litigated and contemplated by the settlement," and the release must expressly state that it bars "future" claims. Br. 31 (internal quotation marks omitted). Even crediting that proposition, *arguendo*, it is beside the point here. As explained above, *see supra* pp. 43–45, Saturn's claims center on AT&T's continued adherence to its existing, previously litigated policies.

The *Schwartz* court's discussion of *Main Line Theatres, Inc. v. Paramount Film Distributing Corp.*, 298 F.2d 801 (3d Cir. 1962), only bolsters this view of Saturn's claims. *Main Line* involved the construction of an oral settlement agreement that resolved a suit by movie theaters concerning specified practices of the defendant film distributors. *See id.* at 802. The suit sought both money damages and injunctive relief against the

continuation of those practices, and the parties reached an oral settlement agreement in which the plaintiffs agreed to accept a specified sum to resolve the dispute. *See id.* at 802–03. That oral agreement contained no express release provision, and it thus neither expressly released future claims nor limited the scope of any release to claims accruing by a date certain. *See id.* On those facts, the Third Circuit concluded that the agreement necessarily released subsequent claims concerning the litigated practices. *See id.* at 803 ("Certainly, a defendant offering a sum in settlement of a suit asking, among other things, for an injunction against certain conduct, would not understand that a similar demand could be asserted the day after settlement."). Because the present case is analogous to *Main Line*—which *Schwartz* recognizes to have involved "claims based on the *past* conduct of the defendant[s]," 157 F. Supp. 2d at 578 (emphasis added)—*Schwartz* itself undermines Saturn's public policy argument. *See also Reconsideration Order* ¶ 17 & n.46 (A. Vol. V, Tab N, 4, 9) (distinguishing *Schwartz*).

C. This Court Lacks Jurisdiction to Consider Whether AT&T's Alleged Breach of the Settlement Agreement Voids the Release, Which in Any Event It Does Not.

Saturn further contends that the release is void on a theory that "AT&T failed to live up to its obligation" under the Settlement Agreement to conduct a bulk migration of 2,500 existing Saturn customers to the new, commingled

network. Br. 34; *see id.* at 33–34. Saturn raised a version of that argument in its pleadings to the FCC's Enforcement Bureau. *See Order* ¶ 43 & n.128 (A. Vol. IV, Tab L, 8–9, 20). Saturn abandoned the argument, however, when seeking full-Commission review of the Bureau's *Order*. *See* Motion for Reconsideration 19–20 (A. Vol. V, Tab M, 19–20); *see also generally* Saturn's Reply to AT&T's Opposition to Saturn's Motion for Reconsideration (S.A. Tab 1) (May 24, 2013). Accordingly, Saturn failed to give the full Commission an "opportunity to pass" on the argument. 47 U.S.C. § 405(a). This Court therefore lacks jurisdiction to consider it. *See, e.g.*, *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 279 (D.C. Cir. 1997) ("Under the plain language of Section 405, an issue cannot be preserved for judicial review simply by raising it before a [b]ureau of the FCC. It is 'the Commission' itself that must be afforded the opportunity to pass on the issue.").

In any event, the argument is unsound. Its premise is that a material breach of contract by AT&T would automatically excuse Saturn from any obligation of future performance. *See* Br. 34. But as the *Farese* Court observed when rejecting an analogous attempt to avoid the release in that case, Florida law does not provide "that breach of a settlement agreement automatically rescinds or voids the agreement." 297 F. App'x at 927; *see*

Order ¶ 43 (A. Vol. IV, Tab L, 8–9). For example, under Florida law, "a party seeking to avoid a release must tender the return of whatever has been received in connection with the execution thereof." *Sall v. Luxenberg*, 302 So. 2d 167, 167 (Fla. Dist. Ct. App. 1974) (per curiam); *see* 10 Fla. Jur. 2d Compromise, Accord, and Release § 77. Here, Saturn has retained the billing credits it received from AT&T under the Settlement Agreement. *See Order* ¶ 42 & n.126 (A. Vol. IV, Tab L, 8, 20); *see also* AT&T Response Brief 37 (S.A. Tab 2, 37) (asserting that Saturn "has not yet offered . . . to return any of the financial benefits that AT&T conferred on [Saturn] as part of the Settlement Agreement"). Without having tendered return of that consideration, Saturn cannot now claim the release is void.

III. THE FCC REASONABLY CONCLUDED THAT THE INTERCONNECTION AGREEMENT FORECLOSES SATURN'S COMMINGLING AND MIGRATION CLAIMS UNDER SECTIONS 251 AND 271.

Even if this Court disagrees that the Settlement Agreement bars Saturn's claims, the FCC reasonably concluded that the Interconnection Agreement forecloses Saturn's commingling and migration claims under Sections 251 and 271 of the Communications Act (Counts 1, 5 through 7, 9, and 11 in the Formal Complaint). *See Reconsideration Order* ¶¶ 21–23 (A. Vol. V, Tab N, 5–6). The FCC's determination on this point—which is "wholly" independent of the agency's interpretation of the Settlement

Agreement, *id.* ¶ 21 (A. Vol. V, Tab N, 5)—stems from the agency's construction of the Communications Act, to which this Court owes deference under *Chevron*. *E.g.*, *BellSouth*, 317 F.3d at 1277.

It is well established that "[t]he duty to provide [an unbundled network element], such as a DS-0 loop, or a migration service, under Section 251(c)(2) and (3) is not self-executing." *Reconsideration Order* ¶ 21 (A. Vol. V, Tab N, 5); *see also CGM*, 664 F.3d at 50 ("[S]ection 251(c)'s obligations are not generally self-executing."); *MCI*, 446 F.3d at 1172 ("[F]ew of the substantive obligations contained in the local competition provisions of sections 251 and 252 are altogether self-executing . . . ."). The Act contemplates that parties will implement those duties in interconnection agreements. *See BellSouth*, 317 F.3d at 1278 ("Interconnection agreements are tools through which the [1996 Act is] enforced."); *SBC*, 407 F.3d at 1225; *Reconsideration Order* ¶ 21 & n.61 (A. Vol. V, Tab N, 5, 10) (citing 47 U.S.C. § 251(c)). Moreover, Section 252 expressly permits parties to depart from the ordinary requirements of Section 251(c)(2) and (3) in their negotiated interconnection agreements. *See* 47 U.S.C. § 252(a)(1); *SBC*, 407 F.3d at 1226; *Reconsideration Order* ¶ 21 (A. Vol. V, Tab N, 5); *see also BellSouth*, 317 F.3d at 1286 (Tjoflat, J., dissenting) (citing Section 252(a) in

explaining that "parties who reach a voluntary agreement . . . are exempt from the specific obligations of section 251").

Once a negotiated agreement is approved by a state public utility commission, it is the terms of that agreement—not the provisions of Section 251(c)—that govern the rights and obligations of the contracting parties. *See CGM*, 664 F.3d at 50, 54–55; *see also Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp.*, 305 F.3d 89, 104–05 (2d Cir. 2002) ("If [incumbent carriers] were governed by the abstract duties described in section 251 despite the existence of a particular interconnection agreement that was approved by the state commission after an extensive process of negotiation and arbitration, they would have diminished incentive to enter into such aggrements."), *rev'd on other grounds sub nom. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). Having negotiated an interconnection agreement that addresses an incumbent carrier's obligations on particular issues, a competitive carrier may not then invoke Section 251 to impose parallel, more stringent duties not "embodied" in the agreement. *CoreTel Va., LLC v. Verizon Va., LLC*, 752 F.3d 364, 374 (4th Cir. 2014); *see CoreComm Commc'ns, Inc. v. SBC Commc'ns Inc.*, Order on Reconsideration, 19 FCC Rcd 8447, 8451 ¶ 10 (2004) ("[T]he Commission has never held that a [competitive] carrier may successfully charge an [incumbent carrier] with

violating its section 251(c) obligations when the . . . carrier[s] ha[ve] . . . opted into an interconnection agreement that excludes the very section 251(c) obligations at issue."), *denying reconsideration of Core Communications*, 18 FCC Rcd 7568; *Core Communications*, 18 FCC Rcd at 7581–82 ¶ 32. In other words, a competitive local exchange carrier "may not rely upon . . . general section 251 duties to circumvent the more specific terms of an agreement that it has voluntarily chosen to adopt." *CoreComm*, 19 FCC Rcd at 8452 ¶ 11.

Here, Saturn and AT&T agree that the Interconnection Agreement specifies obligations for AT&T with respect to commingling and migration. *See* Br. 35; AT&T's Legal Analysis 25–27 (A. Vol. II, Tab F, 25–27). Under the circumstances, the FCC correctly held that Saturn may not bring direct statutory claims under Section 251(c)(2) or (3), but must instead establish that "AT&T is in breach of the [Interconnection Agreement]." *Reconsideration Order* ¶ 21 (A. Vol. V, Tab N, 5); *see also Trinko*, 305 F.3d at 105 (upholding the dismissal, in relevant part, of a federal district court action that alleged violations of Section 251 when the defendant incumbent local exchange carrier was party to an interconnection agreement, which governed). And as the FCC further held, whether AT&T breached the Interconnection Agreement is a question the parties, in their forum-selection

clause, have reserved to the Florida Commission. *See id.* ¶ 22 (A. Vol. V, Tab N, 5).

For related reasons, the FCC reasonably did not reach the merits of the commingling and bulk-migration claims that Saturn frames as violations of Section 271(c)(2)(B). *See Reconsideration Order* ¶ 21 (A. Vol. V, Tab N, 5). The FCC found—and Saturn does not dispute, *see generally* Br. 40–50—that those claims "are premised entirely on AT&T's alleged violation of Section 251(c)(2) and (3)." *Reconsideration Order* ¶ 21 (A. Vol. V, Tab N, 5). Thus, unless and until the Florida Commission concludes that AT&T breached its commingling and migration obligations under the Interconnection Agreement, there are no "Section 251 duties" in effect for the FCC to enforce under Section 271. *Cf. Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3967 ¶ 31 (1999) (*Bell Atlantic New York*) (declining to require an incumbent local exchange carrier to show compliance, in a Section 271 application proceeding, with an unbundling requirement not yet in "effect"), *aff'd*, *AT&T*, 220 F.3d 607; *see also MCI*, 446 F.3d at 1171 (observing that "the standard of review applied by the FCC

in a section 271 proceeding is highly deferential to the state communications commission").

Saturn nonetheless objects that the FCC, in concluding that the Interconnection Agreement governs Saturn's rights, stated that Saturn has "waived" whatever direct, statutory "rights it might [otherwise] have had." *Reconsideration Order* ¶ 21 (A. Vol. V, Tab N, 5); *see* Br. 35–38. But Saturn takes the FCC's language out of context. In context, it is clear that the FCC simply concluded what is well settled: The legal relationship of parties to a voluntary interconnection agreement that addresses duties under Section 251(c)(2) or (3) is governed by that agreement, which supersedes whatever statutory rights the contracting parties might otherwise have had. *See Reconsideration Order* ¶ 21 (A. Vol. V, Tab N, 5); *see supra* pp. 51–53. Contrary to Saturn's contention, that familiar legal premise does not require factual support.

Saturn also argues, with respect to the commingling claims, that AT&T is precluded under the doctrine of equitable estoppel from arguing that Saturn should have bargained for the right to use off-the-shelf loops in its commingled network when negotiating the Interconnection Agreement. *See* Br. 38–40. But the FCC did not rely on any such argument. Moreover, to the extent that Saturn's equitable estoppel theory effectively repackages its bad

faith negotiation claim (Count 13 in the Formal Complaint), the FCC did *not* hold that the Interconnection Agreement governs that claim—only that the Settlement Agreement precludes it. *See Reconsideration Order* ¶¶ 14–16, 21–22 (A. Vol. V, Tab N, 3–5). As a result, Saturn's argument (Br. 41–44) that the FCC, not the Florida Commission, should decide Saturn's bad faith negotiation claim is inapposite.

IV. THERE IS NO BASIS TO DISREGARD THE INTERCONNECTION AGREEMENT'S FORUM-SELECTION CLAUSE.

Saturn further contends that, even if the Interconnection Agreement governs the Formal Complaint's commingling and migration claims under Section 251 of the Act, the FCC should have disregarded the Interconnection Agreement's forum-selection clause and decided those claims—or at a minimum the parallel claims under Section 271. *See* Br. 44–50. This argument, too, is unavailing.

A forum-selection clause is "prima facie valid and should be enforced absent a strong showing that it should be set aside." *Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1240 (11th Cir. 2012) (internal quotation marks omitted); *accord Manrique v. Fabbri*, 493 So. 2d 437, 440 (Fla. 1986). "The burden is on the party resisting enforcement to clearly show that enforcement would be unreasonable and unjust, or that the clause was

invalid for such reasons as fraud or overreaching," or because "enforcement would contravene a strong public policy of the forum in which suit is brought." *Estate of Myhra*, 695 F.3d at 1240 (internal quotation marks omitted). Here, Saturn offers three reasons why the forum-selection clause should not be enforced—none of which is persuasive.

First, Saturn contends that, at least as to the Section 271 claims, the Formal Complaint implicates "the core of [the FCC's] enforcement mission." Br. 46. Because state commissions "cannot enforce the requirements of [Section] 271," *id.*, Saturn asserts that the FCC had "a statutory duty to hear [the Section] 271 claims," *id.* at 45.

In the context of this case, however, the inability of state commissions to conduct Section 271 enforcement proceedings is beside the point. As already explained, *see supra* pp. 54–55, the FCC correctly determined (and Saturn does not dispute) that Saturn's Section 271 claims duplicate its Section 251 commingling and migration claims, *see Reconsideration Order* ¶ 21 (A. Vol. V, Tab N, 5). On that basis, it was reasonable for the FCC not to consider such claims absent a finding by the Florida Commission that AT&T has violated its Section 251 duties as embodied in the Interconnection Agreement. *Cf. Bell Atlantic New York*, 15 FCC Rcd at 3967 ¶ 31 (cited *supra* p. 54).

Second, Saturn argues that the Interconnection Agreement's forum-selection clause is invalid on the basis of "fraud and overreaching." Br. 47; *see id.* at 41–44. The "fraud" Saturn alleges concerns AT&T's representations, when negotiating the Interconnection Agreement, that commingling off-the-shelf loops is technically infeasible. *See id.* But both this Court and Florida courts have repeatedly held that, to invalidate a forum-selection clause on a theory of fraud or overreaching, the party contesting enforcement must establish that the *formation of the clause itself* was induced on that basis. *E.g.*, *Rucker*, 632 F.3d at 1236; *E. Coast Karate Studios, Inc. v. Lifestyle Martial Arts, LLC*, 65 So. 3d 1127, 1130 (Fla. Dist. Ct. App. 2011). Because Saturn nowhere alleges fraud or overreaching in connection with the formation of the Interconnection Agreement's forum-selection clause, there is no basis to override the parties' agreement to bring disputes to the Florida Commission.

Third, Saturn contends that AT&T's policy of requiring the use of customized loops in commingled networks affected not just Saturn, but other competitive local exchange carriers, and that the FCC "completely ignored" evidence of that industry effect. Br. 47; *see id.* at 47–50. Contrary to Saturn's assertions, the FCC *did* consider the parties' competing evidence on this issue but determined, as a factual matter, that AT&T's policy on commingling did

not affect other competitive carriers. *See Reconsideration Order* ¶ 23 & n.73 (A. Vol. V, Tab N, 6, 10).

Saturn's brief identifies nothing in the record that undermines the FCC's findings. *See* Br. 47–50. Saturn makes a bare assertion that "other [competitive carriers] . . . may have wanted to use commingling." *Id.* at 48 (internal quotation marks omitted). As the FCC found, that assertion is both speculative and contravened by AT&T's express representation that "[Saturn] is the only competitive [carrier] anywhere in AT&T's entire 22-state region that has ever asked to commingle SL1 or SL2 loops with special access transport." *Reconsideration Order* ¶ 23 (A. Vol. V, Tab N, 6); *see id.* ¶ 23 n.73 (A. Vol. V, Tab N, 10). Saturn similarly cannot establish that AT&T's policy "affected the [entire] relevant industry," Br. 47, merely by citing deposition testimony of an AT&T employee that Saturn construes to evince concern that other competitive carriers *might* request commingled arrangements of the kind Saturn desired, *see id.* at 48–50.

V. SATURN HAS FAILED TO STATE A CLAIM UNDER SECTIONS 201 OR 202(A).

Finally, the FCC reasonably concluded that the Formal Complaint (in Counts 2 through 4, 8, and 12) fails to state a claim under Sections 201 or 202(a) of the Act. *See Reconsideration Order* ¶ 24 (A. Vol. V, Tab N, 6). The

FCC's determination on this point warrants *Chevron* deference. *See City of Arlington, Tx. v. FCC*, 133 S. Ct. 1863, 1874 (2013).

The FCC has long recognized that Sections 201 and 202 govern "'interstate communication' or 'foreign communication' by a 'common carrier' as those terms are defined" in the Communications Act. *TPI Transmission Servs., Inc. v. Puerto Rico Tel. Co.*, 4 FCC Rcd 6479, 6479 ¶ 5 (1989); *see Reconsideration Order* ¶ 24 (A. Vol. V, Tab N, 6); *Request for Declaratory Ruling and Investigation by Graphnet Systems, Inc.*, Memorandum Opinion and Order, 73 FCC.2d 283, 287 ¶ 13 (1979) ("Sections 201 and 202 specifically outlaw unjust, unreasonable and discriminatory practices by any common carrier in connection with its furnishing of interstate and foreign communication."). Accordingly, to state a claim under either Section 201 or Section 202, a party must allege unlawful action by a common carrier in connection with the provision of either interstate or foreign communication services. *See, e.g., TPI Transmission*, 4 FCC Rcd at 6479 ¶ 5 (upholding the dismissal of a complaint that "alleged unreasonable discrimination with respect to rates . . . for intrastate common carrier communication services," not interstate or foreign services); *see also Eagleview Techs., Inc. v. MDS Assocs.*, 190 F.3d 1195, 1197 (11th Cir. 1999) (per curiam) (upholding the denial of claims under Sections 201(a) and

202(a) when the defendant "was not a common carrier as defined by the Act").

Here, the FCC found that the sole basis Saturn asserted for its claims under Sections 201 and 202(a) was AT&T's alleged "failure to comply with its unbundling obligations." *Reconsideration Order* ¶ 24 (A. Vol. V, Tab N, 6). And under settled agency precedent, the FCC explained, "the provision of an unbundled network element is not the provision of a telecommunications service." *Id.* (quoting *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20595 ¶ 95 (1997)); *see Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8864–65 ¶ 157 (1997), *rev'd in part on other grounds*, *Texas Office of Public Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999); *see also Verizon*, 535 U.S. at 491–92 & n.13 (distinguishing between "network elements" and "telecommunications service[s]"); *AT&T*, 525 U.S. at 387 (quoting 47 U.S.C. § 153 for the proposition that a "network element" is "a facility or equipment *used in the provision of a telecommunications service*" (emphasis added)).

Saturn does not appear to dispute that, to state a claim under Sections 201 and 202(a), a party must allege unlawful common carrier action in

connection with interstate or foreign communication services. *See* Br. 50–53. Nor does Saturn argue that the provision of an unbundled network element is a qualifying service. *See id.* Instead, Saturn contends it has stated a claim under Sections 201 and 202(a) because *Saturn itself* provided services to customers that enabled them to make foreign or interstate "long distance" calls, *id.* at 51, and because the Formal Complaint alleges that AT&T's "monopolistic" practices have affected other competitive local exchange carriers, not just Saturn, *see id.* at 51–53. None of those allegations is sufficient to sustain Saturn's claims that AT&T failed "to furnish [an interstate or foreign] communication service upon reasonable request therefor," 47 U.S.C. § 201(a), or that AT&T acted unjustly, unreasonably, or in a discriminatory manner in connection with such a service, *see id.* §§ 201(b), 202(a).

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Federal Rule of Appellate Procedure 32(a)(7), I hereby certify that the accompanying Brief for Respondents in the above-captioned case was prepared using a proportionally spaced typeface (Times New Roman, 14 point) and contains 13,665 words, exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Eleventh Circuit Rule 32-4.

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STATUTORY ADDENDUM

47 U.S.C. § 201

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from

furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 202

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 202. Discriminations and preferences

(a) Charges, services, etc.
It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included
Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty
Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 251

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTHER II. COMMON CARRIERS
PART II. DEVELOPMENT OF COMPETITIVE MARKETS

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of

this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October

26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or

regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term ‘incumbent local exchange carrier’ means, with respect to an area, the local exchange carrier that--

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

47 U.S.C. § 252(a)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART II. DEVELOPMENT OF COMPETITIVE MARKETS

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

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47 U.S.C. § 271

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART III. SPECIAL PROVISIONS CONCERNING BELL OPERATING COMPANIES

§ 271. Bell operating company entry into interLATA services

(a) General limitation

Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

(b) InterLATA services to which this section applies

(1) In-region services

A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in subsection (i) of this section) if the Commission approves the application of such company for such State under subsection (d)(3) of this section.

(2) Out-of-region services

A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section.

(3) Incidental interLATA services

A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g) of this section) originating in any State after February 8, 1996.

(4) Termination

Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termination for interLATA services, subject to subsection (j) of this section.

(c) Requirements for providing certain in-region interLATA services

(1) Agreement or statement

A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) Presence of a facilities-based competitor

A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

(B) Failure to request access

A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application

under subsection (d)(1) of this section, and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f) of this title. For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252 of this title, or (ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

(2) Specific interconnection requirements

(A) Agreement required

A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought--

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

(B) Competitive checklist

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title.

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to--

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim

telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

(d) Administrative provisions

(1) Application to Commission

On and after February 8, 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

(2) Consultation

(A) Consultation with the Attorney General

The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight to the Attorney General's evaluation, but such evaluation shall not have any

preclusive effect on any Commission decision under paragraph (3).

(B) Consultation with State commissions

Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this section.

(3) Determination

Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that--

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and--

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B) of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

(4) Limitation on Commission

The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B) of this section.

(5) Publication

Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

(6) Enforcement of conditions

(A) Commission authority

If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing--

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to subchapter V of this chapter; or

(iii) suspend or revoke such approval.

(B) Receipt and review of complaints

The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

(e) Limitations

(1) Joint marketing of local and long distance services

Until a Bell operating company is authorized pursuant to subsection (d) of this section to provide interLATA services in an in-region State, or until 36 months have passed since February 8, 1996, whichever is earlier, a

telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of this title with interLATA services offered by that telecommunications carrier.

(2) IntraLATA toll dialing parity

(A) Provision required

A Bell operating company granted authority to provide interLATA services under subsection (d) of this section shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) Limitation

Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

(f) Exception for previously authorized activities

Neither subsection (a) of this section nor section 273 of this title shall prohibit a Bell operating company or affiliate from engaging, at any time after February 8, 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before February 8, 1996, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this

section.

(g) “Incidental interLATA services” defined

For purposes of this section, the term “incidental interLATA services” means the interLATA provision by a Bell operating company or its affiliate--

(1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

(B) of the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services;

(C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

(D) of alarm monitoring services;

(2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5) of this title;

(3) of commercial mobile services in accordance with section 332(c) of this title and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

(6) of network control signaling information to, and receipt of such

signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

(h) Limitations

The provisions of subsection (g) of this section are intended to be narrowly construed. The interLATA services provided under subparagraph (A), (B), or (C) of subsection (g)(1) of this section are limited to those interLATA transmissions incidental to the provision by a Bell operating company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public. The Commission shall ensure that the provision of services authorized under subsection (g) of this section by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.

(i) Additional definitions

As used in this section--

(1) In-region State

The term “in-region State” means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before February 8, 1996.

(2) Audio programming services

The term “audio programming services” means programming provided by, or generally considered to be comparable to programming provided by, a radio broadcast station.

(3) Video programming services; other programming services

The terms “video programming service” and “other programming services” have the same meanings as such terms have under section 522 of this title.

(j) Certain service applications treated as in-region service applications

For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that--

(1) terminate in an in-region State of that Bell operating company, and

(2) allow the called party to determine the interLATA carrier,

shall be considered an in-region service subject to the requirements of subsection (b)(1) of this section.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Saturn Telecommunication Services, Inc., Petitioner	)	
v.	)	**No. 14-15422-E**
Federal Communications Commission and the United States of America, Respondents.	)	

CERTIFICATE OF SERVICE

I, Sarah E. Citrin, hereby certify that on May 12, 2015, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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